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No. 94-0017

In The

Supreme Court of the United States

October Term, 1994

EMMITT H. STEPHENS, JR.,

Petitioner,

vs.

HAROLD W. IVEY and BONNY ASSOCIATES,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals Of Georgia

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Petitioner's right to freedom of speech, and his rights to equal protection and due process, were violated by the trial judge's finding that Petitioner's motions to disqualify the trial judge were legally insufficient?

2. Whether Petitioner's equal protection and due process rights were violated by the trial court's order prohibiting Petitioner, on grounds of relevancy, from presenting evidence to the jury of matters occurring after the filing of the Petitioner's civil rights complaint which related to matters occurring during a discovery deposition and employment of Respondents' counsel?

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondents, Harold W. Ivey and Bonny Associates, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Emmitt H. Stephens, Jr.

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia is reported at 212 Ga. App. 407, 442 S.E.2d 248 (1994). The Supreme Court of Georgia denied the Petition for Writ of

Certiorari on April 29, 1994. Both decisions are reproduced in the Appendix to Petitioner's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This is a civil rights action filed by Emmitt H. Stephens, Jr. (hereinafter "Petitioner") in the Superior Court of Fulton County, Georgia against a partnership, Bonny Associates, and its principal, Harold W. Ivey (hereinafter "Respondents"), in which it was alleged by Petitioner that he was denied the right to rent space in a shopping center on account of race. [R,4-14]

In late October, 1989 [T-331], Petitioner called the office of Respondents to inquire about the availability of a vacant space in the strip shopping center owned by Respondents in Newnan, Georgia. The vacant space contained almost 10,000 square feet and was unimproved, having been formerly occupied by a Revco store. The next day Respondents' agent, Calvin Tatum, met with Petitioner and his wife at the site and showed the space. Petitioner described to Mr. Tatum the fact that he and his wife wanted to operate a teen center for the purpose of providing a recreational area for teenagers. [T-331]

Mr. Tatum quoted the rental rate for Petitioner and in due course furnished Petitioner with the printed form of lease usually used by Respondents for the rental of space in the strip shopping center. [T-331]

During the course of negotiations for the space, Petitioner informed Respondents that instead of operating a

teen center, he and his wife had decided they wanted to operate a supper club, or night club, and that he would seek to obtain a beer and wine permit. [T-331] That changed the complexion of the negotiations because the operation of a night club facility would involve the expenditure by Petitioner of considerable sums of money to improve the premises, including things as lighting, floor covering, kitchen equipment, bar equipment, partitioning and the installation of additional restrooms. Respondents were concerned that Petitioner had neither the financial ability nor the experience to successfully operate a night club facility, and that contractors employed by him to make improvements on the premises might file liens on the property.

Respondents had previously owned a shopping center in Atlanta where a night club had been located, and Respondents were fully aware of the problems which a landlord could encounter in a night club operation. These problems include additional expenses for security, utilities and the cleanup of the parking facility because of the fact that night club customers, after an evening of drinking, tend to leave empty beer bottles and empty cups in the parking lot and often become unruly. [T-339]

Respondents' agent advised Petitioner that Respondents would need to see a financial statement [T-343-344] and that Petitioner would have to make arrangements to put up a security deposit or bond or otherwise guarantee the fact that any improvements to the premises would be paid for. [T-340]

Respondents furnished Petitioner a key so that he could have his contractors and architect examine the premises. [T-329]

The requested financial statement revealed that Petitioner had a net worth of approximately $53,000 made up principally of antique furniture (which later turned out to be simply reproductions) having a claimed value of some $31,000, and jewelry and diamonds having a value of some $10,000. [T-344]

Some eleven days later, Petitioner furnished a new financial statement indicating a net worth of several hundred thousand dollars, made up in the main of promissory notes said to be owed to Petitioner's company, rather than Petitioner individually. [T-346]

When the negotiations did not go to suit Petitioner, he and his wife employed a lawyer in Newnan, Georgia by the name of George Rosenzweig, who filed a quiet title action in the Superior Court of Coweta County (a court obviously without any jurisdiction), claiming that somehow Petitioner and his wife had acquired a real property interest in the shopping center and alleging that Petitioner and his wife intended to operate a teenage center in the shopping center, with no mention being made of the operation of a night club. [T-349] Respondents turned the matter over to an attorney in Newnan, Georgia, Mr. Littleton Glover, and Mr. Glover undertook to defuse the matter by attempting to negotiate a lease with Petitioner and his counsel. There were negotiations back and forth with respect to whether or not Mrs. Stephens was to sign the lease and as to whether or not a bond was to be

posted or some security given to cover the improvements to be made.

Finally, Mr. Glover and Mr. Rosenzweig came very close to reaching an agreement and Mr. Glover tendered to Mr. Rosenzweig a lease and tri-party agreement covering the deposit of construction funds. Respondents agreed that Petitioner's wife did not have to sign the lease and, according to the testimony of Mr. Glover, he thought the matter was settled; that the lease would be signed; and that the parties would go forward. [T-351]

Instead, Petitioner employed his present counsel, Mr. Millard Farmer, who brought this action contending that the lease was not consummated between Petitioner and Respondents because of the fact that Petitioner was an African American.

This is the single straightforward issue that was tried by the court and a jury in a trial that lasted almost two weeks before Honorable William B. Hill, Jr., one of the judges of the Superior Court of Fulton County.

On the trial, the evidence was substantially that set forth by Respondents' counsel in his opening statement to the jury, namely, that Respondents, and particularly Harold Ivey, did not make business decisions on the basis of race, and specifically in this case race had nothing to do with the business dispute. On the contrary, the evidence was that Mr. Ivey had grown up poor; had worked his way into a successful construction business; had never been accused of racial bias or prejudice; had never been a defendant in an action brought on the basis of race; had hired many African Americans; and had been

associated with many African Americans during his business career. [T-323] During his business career, Mr. Ivey was the first general contractor in the Atlanta area to insist that white brick masons and black (or African American) brick masons work side by side on a project even though they belonged to different unions. [T-324] Mr. Ivey had a history of non-discriminatory conduct, including the fact that he had rented to at least one African American in the very shopping center in question, and had, in fact, owned a building in which he rented a night club to an African American, a Mr. J.O. Wyatt. [T-325] That African American businessman appeared as a witness on behalf of Respondents and testified that Respondents had an exemplary record as a non-discriminatory landlord.

It is important to note that Petitioner in his appeal below did not challenge the fairness of the actual trial; the fairness of the evidentiary rulings during the trial; the fairness of the charge given by the court; and the fairness of the verdict in favor of Respondents rendered by the jury. In fact, Petitioner did not even bother to provide the Georgia Appellate Courts with a transcript of the actual two week trial.

Instead, Petitioner complained of matters that occurred before the trial and of events that were collateral to the issue tried by the jury.

During the course of the trial, Petitioner attempted to introduce evidence of the fact that at a deposition in the office of Respondents' former counsel, the law firm of Jones, Day, Reavis & Pogue, a confrontation occurred which Petitioner's counsel described as racial in nature

because of the fact that Petitioner and his counsel were served coffee by an African American dressed in the uniform of a maid. [R,93] Judge Hill would not allow that evidence introduced into the trial and Petitioner contended that ruling was error.

Petitioner's counsel complained of the entry into the case of Mr. William C. Campbell, one of the lawyers for Respondents, as being improper and contended it was error for the court to fail to disqualify Mr. Campbell from appearing as a lawyer in the case. [R,219-236]

During preliminary motions the trial judge held Petitioner's counsel in contempt because he flagrantly violated an order of the court in the presence of the court. This led to Petitioner's counsel filing various motions of one kind or another in an attempt to disqualify the trial judge. Each motion was denied, as the trial judge found that they were legally insufficient. [R,560]

Now Petitioner claims his constitutional rights under the First and Fourteenth Amendment were violated by the trial court's finding that Petitioner's Motions to Disqualify the trial judge were without any merit. Petitioner also complains that his constitutional rights were violated because the trial judge excluded on grounds of relevancy those matters which occurred during a deposition after the complaint was filed. The trial court was upheld on appeal by the Georgia Court of Appeals.[1]

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[1] Petitioner initially appealed to the Georgia Supreme Court which transferred the appeal to the Georgia Court of Appeals. The latter affirmed and the Petitioner's Petition for the Writ of Certiorari to the Georgia Supreme Court was denied.

SUMMARY OF THE ARGUMENT

1. This case presents no special or important reasons for exercise of the Court's discretion to review the case on writ of certiorari. The Petition for Writ of Certiorari fails to demonstrate that there is any compelling reason, as contemplated by Rule 10 of this Court, for granting the writ of certiorari.

2. The trial court was correct in finding Petitioner's Motions to Disqualify to be legally insufficient and in excluding as irrelevant certain matters which occurred after the complaint was filed.

ARGUMENTS AND AUTHORITIES

I.

REASONS FOR DENIAL OF WRIT OF CERTIORARI

This case presents no special or important questions of law for review by this Court. The Petition for Writ of Certiorari fails to demonstrate any compelling reason, as contemplated by Rule 10 of this Court, for granting the writ of certiorari. Indeed, no compelling reasons exist because the decision of the Georgia Court of Appeals does not conflict with the decision of another state court of last resort nor that of a United States Court of Appeals. Nor has the decision of the Georgia Court of Appeals decided an important question of federal law either undecided by this Court or in a way that conflicts with this Court's decisions.

This is simply an ordinary civil rights case decided adversely to Petitioner by the jury after a two week trial. There are no novel or important questions to be decided.

It is a case where Petitioner's counsel found the trial judge not to his liking and embarked upon a campaign to disqualify him by using various tactics without success. The trial judge found that Petitioner's Motions to Disqualify were legally insufficient. That is, Petitioner failed to present facts showing grounds for disqualification. This ruling was affirmed on appeal. Thus, Petitioner now seeks to have this Court review the sufficiency of his Motions to Disqualify the trial judge.

Likewise, Petitioner is dissatisfied with the trial court's ruling on the relevance of certain evidence offered. This decision was likewise affirmed by the Georgia Court of Appeals. Petitioner now asks that this Court review the trial court's ruling on this evidentiary question. However, this should prove to be rather difficult given the fact that Petitioner did not provide the Georgia Appellate Courts with a transcript of the actual trial. Only selected portions of the proceedings below were incorporated into the appellate record. Petitioner has failed to show here any error on the part of the trial judge.

This is simply a case of a disgruntled litigant who, after losing his case at the hands of a jury, now seeks review by this Court. Petitioner has failed to show that the decisions of the trial judge and Georgia Court of Appeals are in conflict with established law and precedent. Thus, nothing is presented for review by this Court and the Petition for Writ of Certiorari should be denied.

II.

THE TRIAL COURT AND GEORGIA COURT OF APPEALS WERE CORRECT.

A. Petitioner's right to freedom of speech, and his rights to equal protection and due process were not violated by the trial judge's finding that Petitioner's Motions to Disqualify the trial judge were legally insufficient.

The procedure in Georgia for disqualification of a trial judge is patterned after the federal procedure. That is, a party is required to file a timely and sufficient affidavit showing the facts and reasons for the belief that bias or prejudice exists; the trial judge must then determine the legal sufficiency of the affidavit; and if sufficient, another judge must then hear the motion. See 28 U.S.C.A. § 144; Georgia Uniform Superior Court Rule 25. Under both the Georgia and federal procedure, only after the legal sufficiency of the affidavit is determined does it become the duty of the judge to proceed no further in the case. *United States v. Azhocar*, 581 F.2d 735, 738 (1978); *United States v. Olander*, 584 F.2d 876, 883 (1978); Georgia U.S.C.R. 25.3.

The trial court determined that Petitioner's affidavits in support of the three Motions to Disqualify were legally insufficient. That is, the affidavits did not present *facts* showing bias or prejudice which would impair or impede impartiality of judgment. The affidavits presented nothing but unsupported conclusions, opinions and speculation. In addition, alleged bias or prejudice against a party's attorney, rather than the party, is not, per se,

grounds for disqualification. *Houston v. Cavanagh*, 199 Ga. App. 387, 388 (405 S.E.2d 105) (1991). The Georgia Court of Appeals affirmed the trial court and found that the Petitioner "has not established a legally sufficient affidavit so as to require a recusal hearing before another judge." *Stephens v. Ivey*, 212 Ga. App. 407, 408, 442 S.E.2d 248 (1994).

Examination of the affidavits set forth by Petitioner in Appendix E confirms that both the trial court and the Georgia Court of Appeals were correct in their finding that the affidavit was legally insufficient. Since Petitioner failed to present a legally sufficient affidavit in support of his Motions to Disqualify, the trial judge was correct. Petitioner has failed to show any constitutional violation in this regard.

B. Petitioner's equal protection and due process rights were not violated by the trial court's order prohibiting Petitioner, on grounds of relevancy, from presenting evidence to the jury of matters occurring after the filing of Petitioner's civil rights complaint which related to matters occurring during a discovery deposition and employment of Respondents' counsel.

Petitioner contends that his constitutional rights were violated because the trial court excluded as not relevant certain evidence related to matters that occurred during a discovery deposition and the employment of Mr. Campbell as counsel for Respondents. The trial court found that "the relevant point of inquiry is whether Mr. Stephens was wrongly denied a lease based upon his race." [T-Excerpt 6]

On appeal to the courts below, Petitioner recognized that "the general rule" in Georgia is that " 'similar acts or omissions on other and different occasions are not generally admissible.' *Skil Corp. v. Lugsdin*, 168 Ga. App. 754(1), 309 S.E.2d 921 (1983)." [Petitioner's Brief filed in the Georgia Supreme Court, pp. 44-45.]

Petitioner argued that the proffered evidence should have been admitted as an exception to the general rule where such evidence of similar acts "may be admitted 'if relevant to an issue in the case and if the evidence does not place too great a danger of undue consumption of time, confusion of issues, undue prejudice or unfair surprise.' *Charles Parrott & Assoc. v. Hunt*, 167 Ga. App. 106, 109(2), 305 S.E.2d 879 (1983)." [Petitioner's Brief filed in Georgia Supreme Court, p. 45.]

Thus, the issue here is nothing more than an ordinary question of relevancy. Under Georgia law, such a question of relevancy is within the discretion of the trial court. *Parker v. Clickener*, 193 Ga. App. 321, 387 S.E.2d 587 (1989).

Petitioner failed to demonstrate in the courts below that the trial court abused its discretion in excluding post-litigation matters on the grounds of relevancy. This is especially so where Petitioner failed to provide the Georgia Appellate Courts with a transcript of the actual trial and therefore there was no record to review to determine whether there was an abuse of discretion. In addition, Petitioner failed to demonstrate any harmful error in the exclusion of the evidence. Therefore, Petitioner's complaint in this regard is without any merit.

CONCLUSION

This case presents nothing more than a disgruntled litigant who, after losing his case at the hands of a jury, complains of vague constitutional violations by the trial judge. The Petition fails to demonstrate any important or compelling reason for exercise of this Court's discretion in granting the Writ of Certiorari. In fact, the Petition fails to even demonstrate that any error was committed by the trial judge. For these reasons, Respondents pray that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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